TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No. 512. 171

CARNEGIE STEEL COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 4, 1914.

(24,253)

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1 I. *Petition and Exhibits. Filed May* 12, 1913.

Court of Claims of the United States.

No. 32463.

CARNEGIE STEEL COMPANY, Claimant,
v.
THE UNITED STATES.

Petition.

(Filed May 12, 1913.)

To the Honorable the Chief Justice and Judges of the Court of Claims, the claimant respectfully shows:

1. On November 20, 1910, the claimant, a corporation organized and existing under the laws of the state of New Jersey, of the one part, and the United States, represented by its contracting officer, Major J. H. Rice, Ordnance Department, United States Army, of the other part, entered into a contract, in writing, a copy of which is hereunto annexed, marked Exhibit A, and made part hereof, whereby it was covenanted and agreed: The claimant engaged (1) to manufacture for the Ordnance Department certain armor and pertaining material, including certain front plates and barbette plates, 18 inches in thickness, all for two 14-inch gun turrets, the same to be made in conformity with instructions, specifications and drawings which were attached to and made part of the contract; (2) to provide certain of the 18-inch plates for purposes of the ballistic test, prescribed by the specifications, the claimant undertaking that such plates, when subjected to the ballistic test,
2 should fulfil certain requirements set forth in the specifications; and (3) to finish the said armor and pertaining material and deliver the same at the works of the Bethlehem Steel Company, South Bethlehem, Pennsylvania, on or before the following dates: the said 18-inch front plates with the material pertaining to them on or before September 7, 1911, and the 18-inch barbette plates with the material pertaining to them on or before November 7, 1911. The United States, on its part, engaged to receive the said armor and pertaining material when manufactured, tested, approved and delivered, as aforesaid, and to pay for the same at the prices or rates per unit named in the contract, the payments to be made in instalments to become payable from time to time as the manufacture of the armor and material progressed and after it should have been delivered. It was further provided that in the event of the failure of the claimant to prosecute the manufacture of the armor and material properly or to complete the deliveries of the same on or before the date named in the contract, the Chief of Ord-

nance might (1) complete the manufacture of the armor and material at the expense of the claimant, charging the claimant with any cost that the United States might incur in so doing, in excess of the contract price of the armor and material; or else (2) waive the time limit named in the contract and permit the claimant to complete the delivery of the armor and material within a reasonable time, and thereupon deduct from the sum stipulated to be paid the claimant for all of the armour and material, as liquidated damages, a sum equal to one-thirtieth of one per centum of the contract price of all armor and material remaining undelivered on November 7, 1911, for each day of delay in its delivery: Provided, however, that in computing the amount of any such deduction, the claimant should be
3 given credit for delays occurring during the performance of the contract, which the Chief of Ordnance might determine to have been due "to unavoidable causes, such as fires, storms, labor strikes, actions of the United States and so forth," and that the date of completion of the delivery, for the purposes of the final settlement between the parties, should be a date to be ascertained by deducting, from the whole period between the signing of the contract and the date of the actual delivery, all delays which were found to have been due to unavoidable causes.

2. In due course, the claimant commenced the manufacture of the said armor and pertaining material and thereafter and until the completion and delivery of the same, the claimant prosecuted the work thereon with all due diligence and despatch. In and about the manufacture and testing of the said 18-inch plates, the claimant encountered difficulties, which were unforeseen by both parties when the contract was made, and were then unforeseeable, and, in consequence thereof, the delivery of the armor and pertaining material was delayed unavoidably, as and in the manner hereinafter stated. Prior to the manufacture of the said armor, no face-hardened armor 18 inches in thickness had been manufactured in this or any foreign country and no information with respect to the process or processes to be employed in its manufacture was obtainable. For the purpose of learning what manner of treatment or face-hardening process should be applied to the said 18-inch plates, in order that they might attain the highest degree of efficiency possible, and meet all requirements of the specifications, the claimant completed one of the said plates, applying to it a treatment or face-hardening process deduced from the formula which the claimant and every other manufacturer of armor plate, in this and every foreign country, had followed in the manufacture of armor plate, and which was recognized
4 by authorities on the subject as the one which would give the best results in the production of armor. Upon its completion, the said plate was, on April 19, 1911, subjected to the ballistic test applied to armor manufactured for the Navy Department at the Naval Proving Ground, Indian Head, and therein met the requirements of the specifications. Thereupon the claimant proceeded to complete all of the 18-inch plates called for by the contract, and, in conformity with the specifications, certain of them were selected by the Ordnance Department for the purposes of the ballistic test

prescribed by the specifications and the said test was conducted at the Army Proving Ground at Sandy Hook, on July 26, 1911. In that test the said plate failed to fulfil the requirements of the specifications. Thereafter, in conformity with the specifications, a second of the said 18-inch plates was selected for purposes of the ballistic test which was conducted at the Army Proving Ground on September 26, 1911, and resulted in the failure of the said plate to fulfil the requirements of the specifications. Thereupon the claimant caused the two failed plates to be returned to its mills, and with all due diligence and despatch, made or caused to be made, by metallurgical experts, most exhaustive tests or experiments, to determine, if possible, the cause of the failure of said two plates under firing conditions, and what modification in metallurgical treatment might be necessary in order to manufacture plates which would comply with the requirements of the contract. It was ascertained as the result of said tests and experiments, that in order to pass the test required by the Ordnance Department the plates must possess certain metallurgical qualities or conditions, which, up to that time, were unknown to any one and the necessity for which was not foreseeable when the contract in suit was made. In conducting the said tests it was
5 necessary to use plates of full size. The experiments were conducted with all due diligence and despatch. After many experiments, which necessarily consumed a great deal of time, it was discovered that the desired results could be obtained by the application of a certain form of treatment which had never before been applied in the manufacture of armor plate. The plates comprising the group of armor were then examined and carefully tested metallurgically, and all plates, which did not meet the conditions which said experts had determined to be necessary, were, with all due and possible expedition, subjected to retreatment. From these plates the Ordnance Department selected a third plate, for the purposes of the ballistic test prescribed by the specifications, and the same was tested at the Army Proving Ground on January 19 and 24, 1912, and was found to fulfil all requirements of the specifications. Thereafter the claimant in due course, finished all of the said 18-inch plates, and they and the remainder of the armor and material for which the contract called were approved by the Ordnance Department and delivered by the claimant, as and in the manner prescribed. By reason of the failure of the first and second test plates to meet the requirements of the specifications, in consequence of their lacking metallurgical conditions which up to that time were unknown and the need of which was unforeseeable, and by reason of the time necessarily expended in experimentation to discover the cause of the said failure and the remedy for it, all as aforesaid, the deliveries of the said armor and pertaining material were delayed and were made from time to time between September 16, 1911, and July 1, 1912, and the claimant avers that the said delays were due to causes which were unavoidable within the meaning of the contract.

3. On or about August 16, 1912, the Ordnance Department, represented by Lieutenant Adams, its inspector, sent the claimant
6 for execution a voucher, whereby the United States proposed to deduct from the contract price of all of the armor and per-

taining material, to wit, $295,081.34, the sum of $8,598.15, as liquidated damages, on account of a portion of the said delay as more fully appears from the table on page 7.

4. On October 16, 1912, the claimant directed a letter to the Chief of Ordnance, a copy of which is hereunto annexed marked Exhibit B, and made part hereof, whereby it protested against the deduction contemplated by the said voucher and showed that it was not liable for liquidated damages because the delays, on account of which it was proposed to make the deduction, were due to the causes described in paragraph 2 of this petition and that the same were unavoidable. On October 22, 1912, the Chief of Ordnance directed a letter to the claimant, a copy of which is hereunto annexed, marked Exhibit C, and made part hereof, wherein he found: (1) that face-hardened armor 18-inches in thickness had never been manufactured before the execution of the contract in suit and that the processes by which the best results could be obtained in the manufacture of such armor could not be accurately predicted, and (2) that the claimant exercised due diligence in the manufacture of the armor and delivered the same as promptly as possible, considering the difficulties encountered and the experimentation necessarily made by the claimants to overcome them. But the Chief of Ordnance, as a conclusion of law, held erroneously that under the terms of the contract, he was without authority to refrain from making the proposed deductions, even though the delay on account of which liquidated damages were imposed was unavoidable.

No. plates.	Description.	Weight.	Price per ton.	Price of item.	Date of delivery named in contract.	Date of delivery.	Total delay; days.	Days occupied by ballistic tests and credited to claimant in conformity with the specifications.	Days' delay for which deductions contemplated.	Amount of deduction contemplated.
216	18" front plate.....	119.4866	$520.00	$62,133.03	9-7-11	2-1-12	145	30	72	$864.13
96	4" shelf plates.....	24.9654	485.00	11,994.26	9-7-11	9-16-11	9	...	9	36.95
...	Accessories.....	1.4022	508.00	712.33	...	...	...	...	...	...
144	18" barbette plates..	252.0759	430.00	108,392.64	11-7-11	6-3-12	178	30	69	875.24
6	Keys.....	1.5925	508.00	793.75	...	...	...	...	...	...
96	18" barbette plates..	216.3248	430.00	93,023.97	11-7-11	6-13-12	223	30	124	1,448.39
1	18" barbette plate...	36.1288	430.00	15,534.52	11-7-11	7-1-12	237	30	138	1,605.20
...	Accessories.....	5.3924	508.00	2,739.24	...	...	...	...	...	...
56	Bearing plates.....	3.380 lbs.	2.50 lb.	147.50	11-7-11	1-16-12	70	...	70	1.44

Total price, $295,081.34. Total deductions, $3,385.35.

On October 22, 1912, the claimant directed a letter to the Chief of Ordnance, a copy of which is hereunto annexed marked
8 Exhibit D and made part hereof, whereby it accepted the payment tendered by the said voucher, but under protest against the said deduction of $8,595.35, and reserved the right to prosecute a claim for the refund of the said sum before the Auditor for the War Department.

On November 29, 1912, and thereafter, the claimant duly made and prosecuted the said claim before the Auditor, but on January 11, 1913, the said Auditor rendered a decision whereby he erroneously disallowed the said claim, for reasons assigned by him as follows:

"The contract provides for the deduction of liquidated damages in case of delay in delivery, except for delays due to 'Unavoidable causes, such as fires, storms, labor strikes, actions of the United States, etc.' The delay appears to have been unavoidable, but not as a result of one of the unavoidable causes mentioned in the contract, and the cause of the delay not being one of those enumerated in the contract, or analogous thereto, said claim is therefore disallowed."

In the exercise of the right given by Section 8 of the act of Congress approved July 31, 1894, the claimant on March 3, 1913, applied to the Comptroller of the Treasury for a revision of the account under the contract in suit as stated by the said Auditor, and on March 21, 1913, the Comptroller rendered a decision whereby he, erroneously, affirmed the action of the Auditor in disallowing the said claim.

5. The claimant is the only person owning or interested in the claim above set forth and no assignment or transfer of the same or any part thereof or interest therein has been made. The claimant is justly entitled to recover and receive from the United States the sum of eight thousand, five hundred and ninety-five dollars and thirty-five cents ($8,595.35), as a part of the price which the
9 United States covenanted and agreed to pay it for the said armor and pertaining material and which has heretofore been and still is wrongly and unjustly withheld from it by the United States as aforesaid. The claimant has made demand upon the United States for payment of the said sum but the same has not been paid nor any part thereof.

The claimant has always borne true allegiance to the United States and has not in any way aided, abetted, or given encouragement to rebellion against it.

Wherefore the claimant prays for judgment against the United States in the sum of eight thousand, five hundred and ninety-five dollars and thirty-five cents ($8,595.35), and for such other and further relief as this Honorable Court may grant, both at law and in equity in the premises.

CARNEGIE STEEL COMPANY,
By A. C. DINKEY, *President.*

JAMES H. HAYDEN,
Attorney for Claimant.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

A. C. Dinkey being duly sworn, deposes and says that he is the President of the Carnegie Steel Company, the claimant named in and which subscribed the foregoing petition; that he has read the same and knows the contents thereof, and that the facts therein stated are true, to the best of his knowledge and belief.

Subscribed and sworn to before me this 9th day of May, 1913.

[SEAL.] R. N. McELHENY,
Notary Public.

My commission expires February 21, 1915.

10 EXHIBIT A.

(Form No. 569.)

These Articles of Agreement entered into the twentieth day of November, 1910, between the Carnegie Steel Company, of Pittsburg, in the County of Allegheny, State of Pennsylvania, hereinafter designated the contractor, of the first part, and the United States of America, by Major J. H. Rice, Ordnance Department, United States Army, hereinafter designated the contracting officer, acting under the direction of the Secretary of War, of the second part, Witness, That the said parties have mutually agreed and by these presents do mutually covenant and agree to and with each other as follows, viz:

Article 1. Under advertisement dated July 18, 1910, and its proposal dated September 6, 1910, as modified by its letters of September 26, 1910, October 31, 1910, and November 17, 1910 (O. O. files 39341-121, enclosure 1, 39341-148, 39341-179, and 39341-210), the said party of the first part does hereby contract and engage with the said United States to manufacture for the Ordnance Department, United States Army, the following armor and pertaining material for two (2) 14-inch Gun Turrets, Model of 1909, at the prices set opposite each, viz:

Two (2) 18-inch front plates at 520 per gross ton.
Fourteen (14) 18-inch barbette plates at $430 per gross ton.
Six (6) 4-inch rear-shelf plates at $465 per gross ton.
Bolts, nuts, keys, etc., at $508 per gross ton.
Cast-iron bearing plates and washers at two and one-half cents per pound.

The manufacture of the armor and the inspection thereof shall be in conformity with "Instructions to Bidders and General Specifications Governing the Manufacture and Inspection of Gun Carriages, Artillery Vehicles, and Similar Ordnance Material," revised March 3, 1910; "Instructions to Bidders and Special Specifications for 14-Inch Gun Turrets, Model of 1909," revised October 10, 1910, hereto attached and forming a part of this contract, and with the following Ordnance Office drawings, viz:

11

Plate.	Class.	Division.	Drawing.	Date or last revision.
XVII	11	6	17	June 30, 1910
CCXI	11	6	211	June 30, 1910
CCXII	11	6	212	June 30, 1910
CCXIII	11	6	213	June 30, 1910
CCXIX	11	6	219	June 30, 1910
CCXXIII	11	6	223	June 30, 1910
CCXXIV	11	6	224	Sept. 30, 1910

The contractor shall furnish and deliver for ballistic test, free of extra charge, at least one (1) 18-inch barbette plate in addition to those enumerated above. The provisions of the Special Specifications are hereby modified to require that all expenses connected with the ballistic test, including plates, transportation charges, cost of ammunition, and cost of labor and material in connection therewith shall be borne by the contractor.

The two (2) 18-inch barbettes will be assembled in the works of the contractor to insure that they conform to the specifications and drawings. All material will be furnished in such condition that it may be readily assembled to the parts to which attached as shown on the drawings.

The final delivery of all the completed articles shall be made f. o. b. the cars at the works of the Bethlehem Steel Company, South Bethlehem, Pennsylvania, the finished 18-inch front plates and 4-inch rear shelf plates with all pertaining material on or before September 7, 1911, and the finished 18-inch barbette plates with pertaining material on or before November 7, 1911.

12 Article 2. Payments will be made as follows, viz: Thirty (30) per cent of the contract price of all the plates, or such lesser sum as will insure that the amount so paid is less than the value of the material, when they shall all have been forged and delivered; thirty (30) per cent, or such lesser sum as will insure that the amount so paid is less than the value of the work done since the preceding payment, when all of the plates shall have received their final treatment; thirty (30) per cent when all the work on the plates shall have been completed, when it shall have been demonstrated by prescribed tests, as required by the specifications, that there has not developed any defect in material or workmanship which, under the terms of this article, the contractor is required to make good, and when the material shall have been delivered at the works of the Bethlehem Steel Company as provided in Article 1; ten (10) per cent of the price of the armor for each turret structure, or such other part of the contract price as may at that time remain unpaid, after all the armor shall have been fastened to the turret for a period of twelve (12) months or until the turret shall have been proof fired and such replacements and adjustments made as are required by the special specifications. For the barbette armor, which is not fastened to the turret, the final ten (10) per cent, or such other part of the contract price thereof as at that time remains unpaid, shall be paid at the expiration of twelve (12)

months from date of shipment from the works of the contractor, provided the material then conforms to the requirements of the drawings and specifications: Provided, That upon the completion of the first payment of thirty (30) per cent, or less, the title to the material upon which the payment is made shall vest in, and said material shall become the sole property of the United States, and shall so remain unless and until the material be rejected
13 under the provisions of this contract, but the possession thereof shall remain with the contractor to treat, machine, fit, and assemble in accordance with the requirements of the specifications; that the contractor warrants the material so delivered and accepted to be free of defects, and guarantees to replace any portion thereof which may prove defective, and which by machining or otherwise becomes defective before shipment, the title to which material when so replaced shall pass to and it shall become the sole property of the United States, and shall so remain unless the material be rejected as aforesaid; that the contractor will perform any additional work that may be required because of defects in such material or workmanship which may subsequently develop before final payment, and that the contractor shall be responsible for any liens that may lie or attach upon or against said material or any part thereof, and for any damage to or loss of the same before delivery at the works of the Bethlehem Steel Company. Any provisions of the specifications in conflict with the provisions of this article are hereby annulled to agree therewith.

Article 3. The United States reserves the right to order additional supplies under this contract, not to exceed twenty per cent in each case, of the quantities contracted for, at the prices and rates of delivery stated in Article 1, under appropriations available at the date of this contract.

Article 4. It is mutually agreed that in the event of the failure of the party of the first part to deliver any or all of the armor, etc., herein contracted for by the date determined in accordance with the proviso contained in Article 8 of this contract for the final delivery of all of the armor, etc., contracted for, there will be deducted as liquidated damages from any payment to be made to the party of the first part, one thirtieth of one per cent of the contract price of
14 all of the armor, etc., remaining undelivered for each and every day of delay in the completion of the contract. It is understood that this deduction will not be made by way of penalty, but as liquidated damages, the deduction representing as nearly as practicable the value of the armor etc., to the United States as a public utility the extra expenses of inspection, and such other damages as may be sustained by reason of the default.

Article 5. All material furnished under this contract shall be at all times subject to inspection by the proper officers of the Ordnance Department, United States Army; and whatever material furnished which does not in all respects fulfil the requirements of the contract shall be rejected, and the decision of the inspecting officer as to the quantity and quality of the material furnished shall

be final. The party of the first part will be required to replace all material so rejected.

Article 6. It is stipulated and agreed that the Chief of Ordnance, United States Army, may make changes in the drawings forming part of this contract, and if such changes involve extra labor and material, a fair price will be paid therefor; but if such changes involve less labor and material, a fair deduction will be made from the contract prices. No claim for addition or deduction on account of such changes will be made unless the same have been ordered in writing.

Article 7. In the event of the failure of the party of the first part to prosecute properly at any time the manufacture of the material herein contracted for, or to complete the delivery at the time agreed upon in Article 1 of this contract, the Chief of Ordnance, United States Army, may, after notification in writing, proceed at the expense of the party of the first part to complete the manufacture or delivery of the material contracted for or of any part thereof, in such a manner as he may deem best for the interests of the public service, charging any excess of cost resulting from such failure to the party of the first part.

Article 8. In the event of the failure of the party of the first part to complete the delivery of the material contracted for at the time specified in Article 1 of this contract, the Chief of Ordnance, United States Army, in lieu of proceeding as provided for in the preceding Article, may waive the time limit, whereupon the party of the first part shall prosecute the work diligently and complete the delivery within a reasonable time, and there shall be deducted from any payment due, or to become due, the liquidated damages, if any, provided for in Article 4: Provided, however, That in making final settlement based upon the date of completion of the delivery, the party of the first part shall receive credit for such delays occurring during the performance of the contract as the said Chief of Ordnance may determine to have been due to unavoidable causes, such as fires, storms, labor, strikes, action of the United States, etc., and the date of completion shall be considered for the purposes of final settlement as the date of the actual completion of the delivery less the delays due to said unavoidable causes; but none of the above causes shall constitute a basis for an action against the United States for damages.

Article 9. No person or persons shall be employed in the performance of this contract who are undergoing sentences of imprisonment at hard labor which have been imposed by the courts of the several States, Territories, or municipalities having criminal jurisdiction.

Article 10. The party of the first part agrees to hold and save the United States, and all persons acting under them, harmless from and against all liability on account of patent rights granted by the United States which may affect the material to be delivered under this contract.

Article 11. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out

this contract either with the transferrer or transferee; but all rights of action for any breach of this contract by said party of the first part are reserved to the United States.

Article 12. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share of this contract, or to any benefit which may arise herefrom.* But this stipulation, so far as it relates to Members of or Delegates to Congress is not to be construed to extend to this contract.

Article 13. If any doubts or disputes shall arise as to the meaning of anything in this contract, the matter shall be referred to the Chief of Ordnance, United States Army, for determination. If, however the party of the first part shall feel aggrieved at any decision of the Chief of Ordnance, it shall have the right to submit the same to the Secretary of War, and his decision shall be final.

The price of 18-inch front plates was changed from $530 to $520 per gross ton before signature.

CARNEGIE STEEL CO.
A. C. DINKEY, *President,*†
(Party of the First Part.)
J. H. RICE, *Major,*
Ordnance Department, U. S. Army.

Attest:
W. W. BLACKBURN, *Secretary.*

(Executed in Quintuplicate.)

* Here add to any contract made with an incorporated company for its general benefit the following words, viz: "But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract." Sec. 3740, Revised Statutes.

† No seals will be affixed after signatures to this contract.

17 EXHIBIT B.

October 16, 1912.

MY DEAR SIR: Referring to our interview on the 15th instant, with regard to the contract of the Carnegie Steel Company, dated November 20, 1910, for the manufacture and delivery of "armor and pertaining material for two 14-inch gun turrets, Model 1909," I beg to say:

The total price of the armor covered by this contract was $295,081.34. The voucher which your inspector at the Homestead Steel Works sent to the Company on August 16, 1912, calls for deductions to be made from the company's compensation, as liquidated damages, as follows:

February 1, 1912, two 18″ front plates	$994.13
September 16, 1911, rear shelf plates, etc	36.95
May 3, 1912, seven 18″ barbette plates	2,875.24
June 17, 1912, six 18″ barbette plates	3,844.99
January 16, 1912, cast iron bearing plates, etc	3.44
July 1, 1912, one 18″ barbette plate	840.60
	$8,595.35

The contract (Article IV) provides for the deduction of liquidated damages in the event of the company's delay in delivering the material, but Article VIII, referring to Article IV, contains this:

"Provided, however, that in making final settlement based upon the date of the completion of the delivery, the party of the first part shall receive credit for such delays occurring during the performance of the contract as the said Chief of Ordnance may determine to have been due to unavoidable causes, such as fires, storms, labor strikes, action of the United States, etc., and the date of com-
18 pletion shall be considered for purposes of final settlement, as the date of the actual completion of the delivery, less the delays due to the said unavoidable causes."

I respectfully submit that the delay in completing the delivery of the above material was due to unavoidable causes and that it would be fair and just for you to credit the company with a period equal to the delay.

No plates of the thickness required (18 inches) and capable of meeting the tests specified, had ever before been produced. No information with respect to the process for manufacturing them was obtainable anywhere. Employing the rules and methods which it had found efficient and was using in the manufacture of other armor, the company, at first, produced an experimental plate, and tested it at the Indian Head Proving Ground on April 19, 1911. Navy shells were used, and it passed the test successfully. On June 30, 1911, all of the 18-inch plates required by the contract having been completed, one was selected for ballistic test. The trial occurred at the Sandy Hook Proving Ground on July 26, 1911. Army shells were used and the plate failed. It was returned to the company for investigation, and, thereafter, a second plat was selected. This was tested at Sandy Hook Proving Ground on September 26, 1911, but failed, like the former plate. After further investigation as to uniformity, physical and chemical, and retreatment, a third plate was selected for ballistic test on January 9, 1912. It was tested at Sandy Hook, using Army shells, on January 19 and 24, 1912, when it passed very successfully.

Because of the impossibility of gaining, from any source, information with respect to the treatment necessary to produce plates which would meet the requirements of the specifications, extensive
19 experimentation was necessary. As the result of numerous and lengthy experiments, it was found that, in order to produce 18-inch plates that would meet the ballistic requirements, treatment in the furnace had to be maintained for seventy-two hours. In the production of plates of 12 and 14 inches' thickness, the rule governing the duration of the treatment had been found to be, one hour for each inch of thickness, with six hours added, i. e., for a 14-inch plate, treatment in the furnace for twenty hours.

All of the delay which, according to the voucher, is attributed to the company, was due to the time consumed in experimentation.

It is true, and, I believe, will be conceded, that the Carnegie Company used all possible expedition, first to discover the process by which the plates could be made, and then to make them and submit

them for test. There was no delay that the Carnegie Company, or any other manufacturer, could have avoided. When the contract was undertaken, it was recognized by the Bureau, as well as by the Company, that difficulties would be encountered in producing the plates, but the difficulties experienced were far greater than either party foresaw and greater than they or anyone else could have foreseen. They were caused by metallurgical conditions that were unknown.

It is respectfully submitted that, under these circumstances, the delay should be determined by you to have been due to "unavoidable causes." Article VIII names, specifically, as some of the unavoidable causes contemplated, fires, storms, labor strikes, the action of the United States, but clearly these are mentioned only for purposes of illustration. It is significant that they are preceded by the words "such as" and followed by the word "etc." The intent of the contract is that damages shall be imposed where, by the em-
20 ployment of any known facilities and the exercise of all possible diligence, the delay could have been prevented, but that the contractor shall not be held responsible for delay which occurred from causes that could not be avoided by any manufacturer, however diligent.

In a case decided by the Comptroller of the Treasury on January 13, 1909 (15 Compt. 421), the contract drawn in question provided for the deduction of liquidated damages in the event of delay, but authorized the Secretary of Agriculture to extend the period allowed for the completion of the work and refrain from imposing liquidated damages, when satisfied that delay had been due to unavoidable causes. There, as in the present instance, mention was made of fire, flood and strikes of employes, as being included by the description "unavoidable causes." The auditor had disallowed an extension of time with remission of damages, which had been granted by the Secretary. On appeal, the Comptroller said:

"The Secretary of Agriculture clearly had the right, under the proviso in subdivision 3, article 1, of the contract, supra, to determine from the facts in the case whether or not any deduction from the amount due the contractor shall be made for the contractor's delay in completing the contract and his right to waive the deduction is not restricted as the auditor's disallowance would seem to indicate. The delay causes were not restricted to those named in said subdivision 3, article 1, of the contract, viz., to 'fire, water and strikes of employes.' These words are not words of limitation when they are preceded by the word 'including.' The very use of the word 'including' negatives any such idea. If the delay were not caused by the government, 'the circumstances, including fire, water and strikes of employes,' which would entitle the contractor to a waiver of the dispensation of the proviso, supra, are not neces-
21 sarily beyond the control of the contractor. The contract lodged in the Secretary of Agriculture the right to determine this question and provides that no deductions for delay shall be made if the Secretary himself 'is satisfied' that such delay has been caused by the act of the government 'or by circumstances, in-

cluding fire, water and strikes of employes, beyond the control of the party of the first part' (the contractor). The auditor correctly states the law, in my opinion, in saying that, where a contract specifically provides for liquidated damages for a breach thereof, the damages cannot ordinarily be waived in favor of the contractor and against the government; and this is true (where the contract itself has not specifically given authority for their waiver) even though it appears that no actual damage to the government has resulted from the breach. The parties having effectually, in law, liquidated, in the contract itself, the probable damages that will result to the government from a breach of the contract, an officer of the government has no legal right in the absence of a right expressly given by the contract, to inquire into the damages which, in his opinion, have actually resulted from the breach. Where, however, as in this case, a right to waive deductions for delay in completing the contract is given in the contract itself, it is immaterial, so far as the right itself is concerned, whether the deductions, which otherwise should be made, are for liquidated damages or for damages of some other and different character. The essential thing to know is, can the damages be waived? In the view I have taken of this case, it is unnecessary to determine whether the contract was one providing, in the event of its breach, for liquidated damages or one for a penalty. The Secretary of Agriculture evidently intended to waive and did waive all right or claim or right to make any deductions in the contract price for erecting those buildings; and, in the absence of fraud or mistake, neither of which is suggested in this case, his decision on the questions of fact involved is conclusive, and
22 his action in the premises, under the very general authority given him in subdivision 3, article 1, of the contract, supra, will not now be revised by me."

I remain,

Very respectfully yours,

JAMES H. HAYDEN,
Attorney for the Carnegie Steel Co.

To the Chief of Ordnance, U. S. Army, War Department.

EXHIBIT C.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ORDNANCE,
WASHINGTON, October 22, 1912.

Mr. James H. Hayden, 1512 H Street, Washington, D. C.

SIR:

1. Acknowledgment is made of receipt of your letter of October 16, 1912, O. O. No. 39341/1643, in regard to liquidated damages assessed against the Carnegie Steel Co., on account of their contract of Nov. 20, 1910, with this Department for the manufacture and delivery of armor and pertaining material for two 14-inch gun turrets, Model of 1909.

2. The facts that face-hardened armor 18 inches in thickness had never been manufactured, and that, therefore, the processes which would give the best results were not known and could not be accurately predicted are accepted by this office. It is also recognized that the company exercised due diligence in manufacture and delivered the articles as promptly as they could, considering the difficulties in the experimentations necessary in overcoming them.

This office, however, has, under the terms of the contract, no
23 authority to remit liquidated damages for a delay consequent upon the facts set forth above, even though such delay was unavoidable.

3. On October 11, 1910, on Appeal No. 19231, of Mr. F. S. Bennett from settlement No. 163,304 of August 23, 1910, by the Auditor for the War Department disallowing his claim of $380.23, the Comptroller of the Treasury rendered decision affecting the present case. Mr. Bennett claimed that the liquidated damages should not be assessed inasmuch as the delay was due to a drought affecting the mill in which the manufacture of the duck covered by the contract was conducted. The Comptroller held that no provision was made for delay caused by drought and a drought is not considered "such as" those named in Article 6, supra.

4. He further states "in arriving at this conclusion I have not overlooked the decision cited by claimant (15 Compt. Dec. 421). The case cited differed from the present one in the facts involved and in the language of the contract therein construed."

5. On request for reconsideration of the decision referred to above, the Comptroller held on Dec. 2, 1910, "claimant's other contention that the contracting officer has found that the delay was unavoidable and that such finding is conclusive in this case is not sustained for the following reasons: * * *"

6. In 15 Compt. 421, it was held that the decision of the Secretary of Agriculture was final when he decided that delay in completing a certain contract was due to unavoidable causes under the following provisions of the contract:

"Provided, however, that where the Secretary of Agriculture is satisfied that such delay has been caused by the party of the second part (United States), or by circumstances, *including* fire, water, and strikes of employes, beyond the control of the party of the first part, then such deduction shall not be made."

24 For reasons stated in said 15 Compt. Dec. at page 425, it was held that the word "including" as itali-zed in the provision last above quoted, in the connection in which it was used was not a word of limitation.

The words "such as," where they occur in article 6 of the present contract, supra, are qualifying words and limit the meaning of "unavoidable delays" to the delays of the character of those named. In the present case if the contracting officer, or his successor, had determined as a fact that the delay in question was due to "unavoidable delays, such as fires, storms, labor strikes, action of the United States," etc., his determination of the fact as to the delay (that is whether said delay was caused by either of the named causes or by

some other cause such as was analogous thereto) "in the absence of fraud or of mistake so gross as to necessarily imply bad faith," would be conclusive. The decision of October 11, 1910, is adhered to."

7. The contract in question is similar in wording to that upon which Mr. Bennett's appeal was based, the term "such as fires, storms," etc., being used and not the term "including fires, storms," etc.

8. In view of the above, and as the cause of delay presented is not one of those enumerated in the contract or analogous thereto, this department is not able to remit the liquidated damages as requested.

9. It is suggested that the company send in the voucher including the deduction for the liquidated damages and obtain payment thereon reserving the right to submit claim for the amount deducted. If such claim is addressed to the Auditor for the War Department, through the Chief of Ordnance, it will be forwarded with a statement as above, in regard to the facts in the case.

Respectfully,

R. BIRNIE,
Col., Ord. Dept., Actg. Chief of Ord.

25 EXHIBIT D.

Carnegie Steel Company.

General Offices, Carnegie Building.

PITTSBURG, PA., October 22, 1912.

DEAR SIR: Referring to your letter of August 16, 1912 (No. A-526-66), with which you enclose a voucher for payment under our contract of November 20, 1910, for 18-inch port plates and barbette plates for Army 14-inch turrets, etc., we beg to hand you, herewith, the voucher sent by you, duly signed by the Carnegie Steel Company. In accepting payment of the sum, $73,453.64, as tendered by this voucher, we respectfully protest against the several deductions from our compensation which are charged as liquidated damages. We beg that you will transmit to the Auditor for the War Department our claim for refund of the following sums, deducted as liquidated damages:

February 1, 1912, two 18″ front plates	$994.13
September 16, 1911, rear shelf plates, &c	36.00
May 3, 1912, seven 18″ barbette plates	2,875.24
June 17, 1912, six 18″ barbette plates	3,844.99
January 16, 1912, cast iron bearing plates, &c	3.44
July 1, 1912, one 18″ barbette plate	840.60
	$8,595.35

The delays on account of which the above deductions are contemplated were due to causes which were unavoidable in fact, and we submit that for reasons stated in our letter to the Chief of Ordnance, dated October 16, 1912, they were unavoidable within the meaning of Article VIII of our contract.

Very respectfully yours,

W. C. HcCAUSLAND, *Treasurer.*

To the Chief of the Ordnance, U. S. A., War Department, Washington, D. C.

26 II. *Defendant's Demurrer. Filed July* 28, 1913.

In the Court of Claims of the United States.

No. 32463.

CARNEGIE STEEL COMPANY
v.
THE UNITED STATES.

Defendant's Demurrer.

Comes now the defendant, by its Attorney General, and demurs to the claimant's petition and, for cause of demurrer, alleges that said petition does not state facts sufficient to constitute a cause of action against this defendant.

HUSTON THOMPSON,
Assistant Attorney General.

MARVIN H. FARRINGTON,
Assistant Attorney.

27 III. *Argument and Submission on Demurrer.*

On February 17, 1914, the demurrer of the defendants in this case came on to be heard. Mr. M. H. Farrington was heard in support of the demurrer; Mr. James H. Hayden was heard in opposition and the demurrer was submitted.

IV. *Order of Court on Demurrer.*

On March 16, 1914, the Court filed an order sustaining in part and overruling in part the demurrer and filed the following opinion thereon:

28 V. *Opinion of the Court on the Demurrer. Filed March* 16, 1914.

CAMPBELL, *Ch. J.*, delivered the opinion of the court:

The contract, a copy of which is attached to the petition, provided for liquidated damages and that "in making final settlement based upon the completion of the delivery the party of the first part [claimant] shall receive credit for such delays occurring during the performance of the contract as the said Chief of Ordnance may determine to have been due to unavoidable causes, such as * * * action of the United States," etc. The defendants demur to the petition.

The Chief of Ordnance determined that 99 days of the delay were chargeable to the defendants. The difficulties under which claimant labored to make the armor plate meet the requirements of its contract were not due to "unavoidable causes" within the meaning of those terms in the contract and, though unforeseen, did not render the performance impossible. The court can not make a different contract from that which the parties made for themselves. (The Harriman, 9 Wall., 161, 172; Sun Printing & Publishing Ass'n v. Moore, 183 U. S., 642; Satterlee's Case, 30 C. Cls., 31; Pacific Hardware Co. v. United States, 49 C. Cls. —.)

2. But in ascertaining the amount of the liquidated damages they were made to run from September 7 as to one installment and from November 7 as to the other installment, those dates being the times when the deliveries of the several installments were to have been made, and, accordingly, there was charged against claimant one-thirtieth of 1 per cent of the contract price of the 18-inch front plates, etc., deliverable on September 7, and the same percentage of the contract price of the barbette plates, etc., deliverable on November 7, in either case giving credit to claimant for the said 99 days' delay occasioned by the Government. We think this was error. It is true, as stated, that the delivery of part of the work contracted for was to be made on September 7 and the remainder on November 7, but the contract, in articles 4 and 8, provided for liquidated damages and the method of computing the same. These articles clearly fix the time at which such damages began to accrue. The provision is that liquidated damages shall be computed from the date determined for the final delivery of all the armor, and "the date of completion shall be considered for the purposes of final settlement
29 as the date of the actual completion of the delivery, less the delays due to said unavoidable causes." The parties could have stipulated for liquidated damages based upon the contract prices for the separate installments and to run from the respective dates fixed for the delivery of the separate installments; but they stipulated otherwise when they provided that the damages should be computed from the date fixed for final delivery of all the armor. Without interpolating a clause which the parties did not use we can not construe these provisions of the contract as being affected by the dates for delivery of separate installments of the work. It is our

duty to give it effect according to its terms. (Sun Printing & Publishing Ass'n, supra.) It follows that the claimant should have been charged with liquidated damages from November 7 and given credit for 99 days for the Government's delay, and that there should have been deducted $1,031.08 less than was deducted.

The demurrer will therefore be sustained in part and overruled in part, and it is so ordered.

30 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 19 day of May, 1914, judgment was ordered to be entered as follows:

It is ordered that the demurrer of the defendants be sustained as to the portion of the claim made by the petition for the recovery of liquidated damages amounting to $7,564.08, deducted for delay subsequent to November 7, 1911, and to that extent it is adjudged, ordered and decreed that the petition of the claimant be dismissed.

It is further ordered that the demurrer of the defendants be and the same is overruled as to the portion of the claim made by the petition for the recovery of liquidated damages amounting to $1,031.08, deducted for the delay up to November 7, 1911.

BY THE COURT.

31 VII. *Application for and Allowance of Appeal.*

From the judgment rendered in the above entitled cause on the 19th day of May 1914, the claimant by its attorney makes application for and gives notice of appeal to the Supreme Court of the United States.

JAMES H. HAYDEN,
Attorneys for Claimant.

Filed May 22, 1914.

Ordered: That the above appeal be allowed as prayed for.
May 28, 1914.

BY THE COURT.

32 In the Court of Claims.

No. 32463.

CARNEGIE STEEL COMPANY
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the order of the Court on demurrer; of the opinion of the Court; of the judgment of the Court; of the application for,

and the allowance of, an appeal of the claimant to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 4″ day of June, A. D., 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

Endorsed on cover: File No. 24,253. Court of Claims. Term No. 512. Carnegie Steel Company, appellant, vs. The United States. Filed June 4th, 1914. File No. 24,253.

FILED
JAN 2 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915

No. 171

Cambria Steel Company, Appellant,

vs.

The United States.

BRIEF FOR THE APPELLANT.

James H. Hayden,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

CARNEGIE STEEL COMPANY *vs.* UNITED STATES.

No. 171. October Term, 1915.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 171.

CARNEGIE STEEL COMPANY, Appellant,

vs.

THE UNITED STATES.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

The Carnegie Steel Company filed its petition in the Court of Claims, seeking to recover $8,595.35, claimed as the unpaid balance of the price payable by the United States, for face-hardened armor plates and pertaining material, furnished by the company to the Ordnance Department, United States Army, under contract dated November 20, 1910.

The petition showed that the Department had refused to pay the balance named, asserting that the company was chargeable with liquidated damages, to a like amount, for delay that had occurred in the delivery of the armor. The company conceded that delay had occurred, also that under different circumstances it would have been chargeable with liquidated damages, but showed that under the terms of the contract, the company could not be held responsible and damages had not accrued to the United States, because the

delay was the result of a certain unavoidable cause. In the exercise of an authority given him by the contract, the Chief of Ordnance had found that the delay was due to the cause that the company assigned, and conceded also that under the circumstances, deliveries of the armor could not have been made earlier than they were. But he held nevertheless that the cause of delay, although unavoidable, was one for which the contract made the company responsible and liable for the sum, withheld, as liquidated damages (*p. 15*). The company showed that this conclusion was erroneous and that the withholding of the balance claimed was unauthorized and wrongful.

In the petition, the contract was set out at length (*pp. 7-11*), and a complete disclosure was made concerning (1) the nature of the difficulty that produced the delay; (2) the circumstances under which the difficulty was encountered; (3) the steps taken by the company to discover and overcome it; and (4) the extent to which it postponed the completion and delivery of the armor (*pp. 2-3; 11-14*).

The subject-matter of the contract was the manufacture and delivery of two front plates and fourteen barbette plates, each to be 18 inches in thickness; six rear shelf plates, each to be 4 inches in thickness, and certain accessories or "pertaining material." This armor was to be made in conformity with specifications, forming part of the contract. Prior to its delivery, it was to be subjected to and meet, successfully, certain tests. Time was made of essence. The delivery of the front plates and rear shelf plates was to occur on or before September 7, 1911, and that of the barbette plates on or before November 7, 1911 (*Art. 1, pp. 7-8*). It was provided however that, if the Company should fail to exercise due diligence in the prosecution of the work, or should fail to make deliveries within the periods named, it should be optional with the

Chief of Ordnance either to terminate the contract forthwith (*Art. 7, p. 10*) or else to waive the time limit and allow the Company a reasonable time within which to complete the delivery of the armor, charging the company with liquidated damages from a date to be determined, marking the end of the period within which the Company could deliver the armor without liability for damages. This date was to be determined at the time of final settlement. It was stipulated, however, that in fixing the date, the company should not be held responsible for any delay that the Chief of Ordnance might find to have been produced by unavoidable causes of a certain kind. Four causes were mentioned to show the sense in which the term "unavoidable" was used. The portions of the contract that dealt with the subject of liquidated damages read as follows (*Art. 8, p. 10*):

> "Article 4. It is mutually agreed that in the event of the failure of the party of the first part (Company) to deliver any or all of the armor, etc., herein contracted for *by the date determined in accordance with the proviso contained in Article 8 of this contract for the final delivery of all of the armor, etc., contracted for*, there will be deducted as liquidated damages from any payment to be made to the party of the first part (Company) one-thirtieth of one per cent of the contract price of all the armor, etc., remaining undelivered for each and every day of delay in the completion of the contract. * * *
>
> "Article 8. * * * *Provided, however*, That in making final settlement *based upon the date of completion of the delivery, the party of the first part* (Company) *shall receive credit for such delays occurring during the performance of the contract as the said Chief of Ordnance may determine to have been due to unavoidable causes, such as fires, storms, labor strikes, action of the United States, etc.*, and the date of completion shall be considered for the purposes of

> final settlement as the date of the actual completion of the delivery *less the delays due to said unavoidable causes;* * * *."

The rear shelf plates and their accessories were delivered on September 16, 1911. The 18-inch front plates were delivered on February 1, 1912. The 18-inch barbette plates with their accessories were delivered from time to time between May 3, 1912, and July 1, 1912. The Chief of Ordnance had elected to waive the time limit and allowed the work to proceed, after the expiration of the periods named in Article 1 (*supra*). The delivery of the 18-inch plates was delayed for 99 days by act of the United States. To that extent the Department made no attempt to hold the company responsible, but for the rest of the delay it made the deduction complained of (*p. 5*). The cause of delay for which the deduction was made, was as follows (*pp. 3, 12-13*): For some twenty years prior to the letting of the contract, face-hardened armor had been produced in this and foreign countries by the Carnegie Company and other manufacturers (*Harvey Steel Company v. United States, 38 Ct. Cls., 662, 664, 675*), but no plate as thick as 18 inches had been made anywhere (*pp. 2, 15*). In the application of the face-hardening process to plates that had been produced, none of which had exceeded 14 inches in thickness, the Carnegie Company and all other manufacturers, domestic and foreign, had followed a formula which had received general acceptance by scientists and experts in the art of armor making, and was relied upon by them as furnishing the rule, that would give the best results in all cases. According to this formula, every armor plate should be subjected to "treatment," as the heating process employed for face-hardening is termed, for a period equal to one hour for each inch of the plate's thickness, plus six hours. Thus, in

the case of an armor plate 12 inches in thickness, the proper duration of the treatment had been found to be 18 hours, and in the case of a plate 14 inches in thickness, 20 hours (*p. 12*). In the absence of positive knowledge, based on experience gained from actual manufacture of 18-inch plates, the company assumed as did others skilled in the art, that the rule which had held good in the treatment of plates, 14 inches and less in thickness, would hold good, also, in the case of plates 18 inches in thickness. Hence that the proper duration of treatment for the latter would be twenty-four hours. It had been found and was the experience of the Carnegie Company and other manufacturers of armor, that if the treatment of any plate were prolonged beyond the period determined in accordance with the above formula, the plate would be rendered brittle and be deprived of the degree of toughness requisite to withstand the ballistic test to which it would be subjected. When the contract was signed, it was not foreseeable that the accepted rule would not hold good in the case of 18-inch plates. Yet, during the performance of the contract it was discovered that, in order to produce an 18-inch plate with a face of the requisite degree of hardness, it was necessary to continue the treatment for seventy-two hours, or three times the period indicated by the rule. It was discovered too, that such prolonged treatment would not deprive an 18-inch plate of the requisite degree of toughness, as it had done in the case of lighter plates. After signing the contract, the company commenced the manufacture of the armor. In conformity with the rule, one of the 18-inch plates was completed, after having been treated for 24 hours. Next, it was subjected to a ballistic test, conducted under the auspices of the Navy Department. It met that test successfully and was believed by experts to possess the ballistic qualities, required. The result confirmed the company in

the opinion that the formula, mentioned, would hold good in the manufacture of the front plates and barbette plates. They were made accordingly. Upon their completion, one of them was selected by the Ordnance Department for purposes of ballistic test. The test was held at the Army Proving Ground on July 26, 1911, and the plate failed to qualify. A second plate, selected by the Department, was tested on September 26, 1911, and failed like the first. Next, the company caused an exhaustive investigation of the matter to be made by metallurgists skilled in the art of armor making, in the hope of ascertaining the reason why the two plates had failed and if possible to find a method by which plates could be produced, capable of passing the test. After a critical examination of the plates that had failed, the experts proceeded to make an extensive and costly series of experiments. These were conducted with all possible diligence, but, necessarily, much time was consumed in making them. The experimentation led to the discovery that the failure of the plates was due to their lack of a metallurgical property or condition, theretofore unknown. It was one of those natural phenomena for which no reason could be assigned. The very existence of the phenomenon being unknown, it had been impossible to make suitable provision for it in the manufacture of the armor. Further experimentation led to the discovery that in order to produce, in an 18-inch plate, the quality or condition necessary to give it the requisite degree of hardness, it was necessary to continue the treatment for seventy-two hours, instead of twenty-four. Certainly the necessity for that could not have been foreseen. The phenomenon had not occurred in the production of lighter plates and had remained undiscovered. Applying the newly discovered rule, or rather, the newly found exception to the general rule, the Company produced a group

of 18-inch plates, from which the Department selected one for purposes of a third test. The third test was completed on Janury 24, 1912, and the plate was found to fulfill the requirements of the contract. The completion and delivery of the rest of the armor followed with all due dispatch (*pp. 2-3, 15*).

When it came time for settlement and question arose concerning the delay and responsiblity for it, the Department conceded, that no face-hardened armor, 18 inches in thickness had been manufactured anywhere, prior to the production of the armor in question; also that, in the absence of positive knowledge based on actual experience, the treatment that would give the best results could not be predicted with certainty; also that the company had exercised due diligence in the production of the armor and that it was delivered as promptly as that could have been done, considering the difficulties encountered and the amount of experimentation necessarily made, first, to discover the difficulty, and then the means by which it could be overcome. Notwithstanding this finding, the Department decided that the company must be held responsible for the delay and charged with liquidated damages, saying that the delay, although unavoidable in fact, was not unavoidable within the meaning of the contract, because it was not produced by one of the four causes named in Article 8 (*supra*) *i. e.*, fires, storms, labor strikes, or action of the United States. It appears that in reaching that conclusion the Ordnance Department accepted as an authority, controlling its action, a decision that had been rendered by the Comptroller of the Treasury in another case. Subsequent to the refusal of the Department to pay the sum in dispute, the company presented a claim for refund to the Auditor and then to the Comptroller, by both of whom it was rejected. Both held that, while the delay was unavoidable, the company was

chargeable with damages because the cause was not one of the four specifically named in the contract.

To this petition, the United States demurred, generally. The Court of Claims sustained the demurrer and dismissed the petition, except in so far as the sum claimed, included an overcharge of $1,031.08 made by the Ordnance Department, in reckoning the amount deducted as liquidated damages. From that judgment, the company appealed (*pp. 18-19*).

Specification of Errors.

The errors of the Court of Claims assigned and intended to be argued are these:

1. The said Court erred in refusing to hold that the cause of the delay, stated in the petition, was unavoidable within the meaning of the contract and in holding that the Company was responsible for the delay and liable for liquidated damages on account thereof.

2. The said Court erred in holding that the United States was authorized to charge the Company with liquidated damages, and withhold payment of part of the price payable for the armor in question, equal to the damages so charged.

3. The said Court erred in failing and refusing to hold that the facts stated in the petition were sufficient to constitute a cause of actior in favor of the Company for the recovery of $8,595.35, wrongfully, withheld by the Ordnance Department, United States Army.

4. The said Court erred in sustaining the demurrer and dismissing the petition, except in so far as the sum claimed, included an overcharge of $1,031.08, made by the United States, in reckoning the amount of liquidated damages that it charged against the Company.

ARGUMENT.

I.

The company was not chargeable with the delay that occurred in the delivery of the armor or liable for the sum that the United States deducted as liquidated damages.

This proposition rests upon the first proviso contained in the eighth article of the contract. The company contends that the proviso could not be interpreted in a way that would lead to the conclusion that the Department was right in refusing to pay the sum in dispute, without departure from generally accepted rules of construction and without doing violence to the language contained in the proviso, namely (*p. 10*):

> "That in making final settlement based upon the date of completion of the delivery, the party of the first part (company) *shall receive credit for such delays* occurring during the performance of the contract, *as the said Chief of Ordnance may determine to have been due to unavoidable causes, such as fires, storms, labor strikes, action of the United States, etc.*, and the date of completion shall be considered for the purposes of final settlement as the date of the actual completion of the delivery *less the delays due to said unavoidable causes;* * * *"

The Ordnance Department (*pp. 14-16*) and the accounting officers (*p. 6*), and finally the Court of Claims held that this was to be treated as equivalent to the following:

> "That in making final settlement based upon the date of completion of the delivery, the party of the first part (company) *shall receive credit for such delays* occurring during the performance of the contract *as*

> *the said Chief of Ordnance may determine to have been due to* * * * *fires, storms,* labor strikes, and action of the United tates, * * * and the date of the completion shall be considered for the purpose of final settlement as the date of the actual completion of the delivery less the delays due to *said* * * * causes."

In short, the court treated as nugatory the words *"unavoidable causes, such as,"* found in the proviso immediately before the words *"fires, storms, labor strikes, action of the United States;"* also the abbreviation *"etc."* found immediately after those words; also the word *"unavoidable,"* occurring just before the last word of the proviso.

It is submitted that that was error.

At the outset it will be convenient to note three general rules of construction that should be kept in mind, when determining the meaning and effect of the proviso.

In the first place: The contract in suit was drawn by the Bureau of Ordnance, and any language of doubtful meaning contained in it should be given an interpretation favorable to the company, rather than one favorable to the Ordnance Department.

> *Noonan v. Bradley, 9 Wall., 394* (Field, J.): "If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which would be more to the advantage of the defendant, upon the general ground that a party who takes an agreement, prepared by another, and upon its faith incurs obligation or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground that when an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right. *Mayer v. Isaac, 6 Mees. & W., 612.*"

Garrison v. United States, 7 Wall., 668 (Miller, J.): "The supplementary agreement is signed by General Butler and not by plaintiff. Its doubtful expressions should, therefore, according to a well-known rule, be constructed most strongly against the party who uses the language."

Orient Mutual Ins. Co. v. Wright, 1 Wall., 456 (Miller, J.): "All its promises (policy of insurance) are made by the defendant, in its own language. All its exceptions and reservations are those of the defendant. The rule is, that when, in such cases, the language requires construction, it shall be taken most strongly against the party making the instrument."

In the next place: The proviso relates to the forfeiture by the company of part of the sum that the Department agreed to pay for the armor actually furnished. Clauses of contracts and of statutes relating to forfeitures invariably receive the one of two or more possible interpretations which is most favorable to the party against whom the forfeiture is asserted.

Philadelphia, Wilmington & Baltimore Railroad Co. v. Howard, 13 How., 307, 340 (Curtis, J.): "The law leans strongly against forfeiture, and it is incumbent on the party who seeks to enforce one, to show plainly his right to it. The language used in this contract, is susceptible of two meanings. One is the literal meaning, for which the plaintiff in error contends, that the declaration of the Company annulled the contract, destroying all rights which had become vested under it, so that if there was one of the monthly payments in arrear and justly due from the Company to the contractor, and as to which the Company was in default, yet it could not be recovered, because every obligation arising out of the contract was at an end.

> "Another interpretation is, that the contract, so far as it remained executory on the part of the contractor, and all obligations of the Company dependent on the future execution by him of any part of the contract might be annulled. We can not hesitate to fix on the latter as the true interpretation."

In *New York Indians v. United States* (*170 U. S., 1, 25*) Mr. Justice Brown, delivering the opinion, said:

> "A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him, and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture."

Even in cases growing out of contracts of the United States, no authority can be found for the proposition that a penal clause, or one providing for the deduction of liquidated damages, shall be given a liberal construction in favor of the government.

In the third place: Where the meaning of an instrument or statute is obscure and the language employed is a proper subject for interpretation, courts will give effect to every provision and word and will not treat any part of it as meaningless or nugatory, unless its provisions are in hopeless conflict.

> *Philadelphia v. River Front R. Co., 133 Penna. St. 134:* "A word, not plainly inserted by accident or mistake, is never to be thrown out entirely while there is a plain and natural construction which can be given to it, not manifestly destructive of the general intent of the sentence."

The Court of Claims could not have reached the conclusion indicated by its judgment, without departure from these three general rules of construction.

The proviso does not purport to be complete in itself and on its face bears evidence of its incompleteness. The expression "such as" and the abbreviation "etc."—a catch-all —demonstrate that fact. It follows that the doctrine "*expressio unius est exclusio alterius*" is not to be followed in determining the true intent and meaning of the proviso. (*United States v. Barnes, 222 U. S., 513.*)

If the law required a strict and literal construction of the proviso in question, instead of the reverse, it would not justify the interpretation that the court placed upon it, for as we have seen, that is neither strict or literal, but really a distortion of the proviso.

Nor can the Court's interpretation be defended on the ground that it was reasonable, for it was not. Presumably the Ordnance Department believed that delay would be detrimental to the government and the penal clauses of the contract were designed to prevent it; but it is evident that the Department realized that difficulties might be encountered during the manufacture of the armor for which it would be quite unjust to hold the company responsible or for which no contractor would assume responsibility. Accordingly, it was provided that the company should not be held responsible for delay found to have been produced by causes of a certain kind—not that the delay due to such causes would be less detrimental to the government, but because the company's excuse would appeal to the Department's sense of right. That was the office of the proviso (*Minis v. United States, 15 Peters, 423; White v. United States, 191 U. S., 545*). Is it not unreasonable to assume that the Department selected, arbitrarily, four of the many unavoidable causes possessing the same characteristics and

said that the company would be excused if the performance of the contract should be delayed by one of the four causes, but not otherwise?

> *Weiss v. Swift & Co., 36 Pa. Superior Court, 376:* "The rule (*ejusdem generis*) would be absurd, if under the head of 'other' no thing can be included in the construction of the act which is not exactly the same in every particular as the thing specified. Nor has it been so applied. * * * Moreover, it has been held upon sound reason that, when a particular word or words exhaust the whole genus, the general term will not be regarded as surplusage, but will be construed to refer to a larger class. This must be so, if regard be had to the rule, which is more imperative than the rule of *ejusdem generis,* that a statute is to be construed as a whole so that, if possible, effect will be given to every part of it."

It is quite evident that the Ordnance Department and the accounting officers and the Court too, proceeded with the idea that the proviso was a fit subject for the application of the maxim *"expressio unius est exclusio alterius."* But in the present instance the facts were not such as to warrant an attempt to apply it. The causes that might relieve the company from responsibility for delay were not limited, arbitrarily, to the four expressly named. By its terms the proviso referred, not to the four causes alone, but to all other unavoidable causes of the same genus or kind, that is to say, causes (1) that were not foreseeable when the contract was made; (2) which were not the result of any act or neglect on the part of the company, and (3) which the company could not prevent. The delay in question possessed those characteristics. (1) It was not foreseeable because the phenomenon of nature was unknown and nothing had been revealed in the manufacture of armor, or in the researches of scientists, to warn the company that such a phenomenon might exist; (2) Being an

undiscovered phenomenon of nature, its occurrence was not attributable to an act or neglect of the company any more than conditions of nature which might have produced an earthquake or a flood; or socialogical conditions that might have produced a labor strike; and (3) the phenomenon being undiscovered and nothing having occurred to warn scientists or experts in the art of armor making, of its existence, the company could not prevent it or the effect that it produced. Clearly, it should be classed as an unavoidable cause, within the meaning of the contract.

> *Broom's Legal Maxims (8th Ed.), 506:* "Great caution is necessary in dealing with the maxim '*expressio unius est exclusio alterius*' for, as Lord Campbell observed in *Sanders v. Evans*, it is not of universal application but depends upon the intention of the party, discoverable upon the face of the instrument or of the transaction; thus where general words are used in a written instrument, it is necessary in the first instance to determine whether those general words are intended to include other matters besides such as are expressly mentioned, or to be referable exclusively to them, in which latter case only can the above maxim be properly applied."
>
> *Id 515:* "Thus it sometimes happens that in a statute, the language of which may fairly comprehend many different causes, some only are expressly mentioned by way of example merely, and not as excluding others of a similar nature."
>
> *Id., 7th Ed., 589:* "The general words inserted in a maritime policy of insurance, after the enumeration of particular perils, are as follows: 'and for all perils, losses and mischance that have or shall come to the hurt, detriment or damage o f the said goods and merchandise and ship, etc., or any part thereof.' These words, it has been observed, must be construed as in-

troduced into the policy in furtherance of the objects of marine insurance and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words; they are entitled to be construed as material and operative words and to have a due effect assigned to them in the construction of this instrument and this will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes; that is to say, the meaning of the general words may be ascertained by referring to the preceding special words."

Nor is this a case for the application of the doctrine of *ejusdem generis*. Except in the particulars mentioned, the four causes enumerated in Article 8 bear no resemblance to one another. Nor can *"etc."*—the "catch-all"—be ignored.

United States v. Mescall, 215 U. S., 26: An employee of the customs service was indicted on the charge of violating the customs administration act, making it a misdemeanor for any "owner, importer, consignee, agent or other person" to make an entry by means of false and fraudulent practices whereby the United States may be deprived of lawful duties. The defendant demurred, and the District Court sustained the demurrer; but its judgment was reversed on writ of error. Mr. Justice Brewer, delivering the opinion of this court, said (*p. 31*):

"Counsel for the defendant invokes what is sometimes known as Lord Tenderden's rule, that, where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described—*ejusdem generis.* The particular words of description, it is urged, are 'owner, importer, consignee, agent.' The general term is 'other person,' and should be read as referring to someone similar to those named,

whereas the defendant was not owner, importer, consignee, or agent, or of like class, with either. He was not making, or attempting to make, an entry. He represented the government, and, contrary to his duties, was rendering assistance to the consignee, who was making the entry. But, as said in National Bank v. Ripley, 161 Mo., 126, 132, in reference to the rule:

'But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. * * * Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus, there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general words to preserve the particular words. In that case the rule would defeat its own purpose.'"

In *Chicago, Milwaukee, &c. Ry. v. Hoyt* (*149 U. S., 1, 14*), it was said:

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. *But where the event is of such a character that it can not be reasonably supposed to have been in the contemplation of the contracting par-*

ties when the contract was made, they will not be held bound by general words, which though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Endlich on Interpretation of Statutes, Section 112: *"The language of a statute is generally extended to new things which were not known and which could not have been contemplated by the legislature when it was passed. This occurs when the act deals with a genus and a thing which afterwards comes into existence is a species of it."*

McReynolds v. The People, 230 Ill., 623: McReynolds was indicted under a statute which denounced the removal, sale, or incumbrance, of grain or other produce, after the issuance of a warehouse receipt therefor, without the written consent of the holder of the receipt. The statute described the place of storage of such goods as "any wharf or place of storage or in any warehouse, mill, store or other building." McReynolds stored the grain in his own warehouse and contended that the statute applied only to warehousemen, wharfingers and other persons engaged in the business of storing goods of others, for hire.

Scott, J., delivering the opinion said:

"The rule ejusdem generis moreover does not apply 'where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more variety; in such case, the general term must receive its natural and wide meaning' (26 Am. & Eng. Enc. Law, 2d Ed., p. 610). If plaintiff's contention that the word *warehousemen* as used in this statute means only a warehouse in which goods were stored for hire, then the word *mill* is of such greatly different significance that the rule under discussion can not be held to so

> limit the words *or other building* as that they will include only buildings in which goods were so stored. * * * In our opinion, the legislature intended sections 124 and 125 *supra* to include all buildings of every kind and character in which goods, wares and merchandise are or may be stored, whether for hire or otherwise."

Brown v. Corbin (*40 Minn., 508*): A law of the State authorized the formation of corporations for objects that were named, expressly, and others referred to as "other lawful business." Interpreting this the Court said:

> "Defendants invoke the rule that when particular words are followed by general words, the general words are restricted in meaning to objects of the kind particularly enumerated and therefore the phrase 'or other lawful business' must be limited to a business of the same kind as those previously enumerated. We think the rule invoked is not applicable at least in the narrow and restricted sense in which defendants seek to apply it. The kinds of business specifically enumerated bear no common analogy to each other, except that they are all of pecuniary profit and of a strictly private character, as distinguished from those to be carried on by quasi public corporations authorized to exercise the right of eminent domain. *Evidently the expression 'or other lawful business' was added as a sort of catch-all for the purpose of including every kind of business of pecuniary profit, not otherwise provided for and which might have been omitted from the previous enumeration.*"

In its opinion filed in the present case the Court of Claims said (*p. 18*):

> "The difficulties under which the claimant labored to make the armor plate meet the requirements of its contract were not due to 'unavoidable causes,' within the

meaning of those terms in the contract, and, though unforseen, did not render the performance impossible."

It is submitted that that was error. Delay in the performance of a contract may result from a cause, which, though unavoidable, and unavoidable in the sense in which that term is used in the contract, would not render performance impossible. Fire or storm may cause damage to a contractor's plant and interrupt the performance of work, but the work can be resumed and completed when the contractor shall have restored his buildings. A labor strike is not a permanent condition. The contractor can resume work on the conclusion of the strike, or he may continue the work employing new men for the purpose. Acts of the United States might be and frequently are such as to delay a contractor's work, but seldom such as to render its performance impossible.

II.

The credit allowed by the Chief of Ordnance for delay caused by act of the United States did not bar the company from asserting in court its right to further credit for the cause assigned or for any other cause of delay on account of which the Chief of Ordnance refused to allow any credit, supposing that he was not authorized to do so.

In the Court of Claims, the United States contended that the allowance to the company of credit to the extent of 99 days, which the Chief of Ordnance conceded to be the period for which the delivery of the armor was delayed by action of the United States, precluded the claimant from asserting its right to additional credit for delay due to the cause assigned. It was argued that the court was without authority to review the decision of the Chief of Ordnance, wherein he held that, in law, he had no authority to give credit

for that cause. To maintain that contention, the United States relied upon the case of *Milne & Co. v. United States* (*45 Ct. Cls., 314, 321*). There the Chief of Ordnance granted an extension of time to cover delay due to a cause for which the contractor claimed, a greater extension. The extent of delay produced by this was purely a question of fact and the court said that it could not review the finding, for the Chief of Ordnance had been made the arbiter to decide questions of fact. Here we have no such question. There is no dispute about the facts. It was conceded by the Chief of Ordnance that the delay in question was due to the cause that the company assigned. He found that the delay resulting from that cause covered all of the delay for which the Department held the company responsible. His refusal to give credit for the delay had no basis except his conclusion that the cause was not unavoidable within the meaning of the contract. Such conclusions of law made by executive officers have always been reviewed by the courts.

In the case of *Ali Gegiow, et al. v. Uhl*, No. 340 of the present term, decided October 25, 1920, it was said:

> "The courts are not forbidden by statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a Commissioner of Immigration is exceeding his power, the alien may demand his release upon *habeas corpus*. The conclusiveness of the decisions of immigration officers under Section 25 is conclusiveness upon matters of fact."

It is submitted that the judgment of the Court of Claims should be reversed.

JAMES H. HAYDEN,
Of Counsel for Appellant.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 171.

CARNEGIE STEEL COMPANY, *Appellant,*

vs.

THE UNITED STATES.

REPLY BRIEF FOR APPELLANT.

The Carnegie Company is not appealing to the courts to relieve it from the obligation that it assumed to pay damages, if it failed to deliver the armor plate contracted for within a limit of time fixed by the contract. The petition shows that the company performed its obligation in conformity with the requirement of the contract (Article 8).

Dermott vs. Jones (*2 Wall, 1*) and other cases cited by the Assistant Attorney-General show continuous adherence to the rule stated in *Paradine vs. Jane* (*Aleyn 26*) the correctness of which does not appear to have been disputed at any time, and which the company does not dispute now, namely:

> "When a party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, *because he might have guarded against it by his contract.*"

By the contract in suit, the Company was guarded against the contingency that delayed the completion of its obligation. The obligation to complete performance within the time specified was not assumed unconditionally. It was stipulated that the company should be relieved from that requirement if delayed in its work by causes of a certain kind. The cause of delay assigned by the petition was of that kind.

To be sure, Article 1 of the contract fixed a certain date as marking the end of the period within which deliveries of armor should be made, but by Article 8 the Chief of Ordnance was authorized to waive the time limit and allow the company a reasonable time within which to complete the delivery. If the Chief of Ordnance waived the time limit—and in that case only—the company was to be chargeable with liquidated damages, unless he found that the company had been delayed in its work by causes of certain kinds. The delivery of the armor was not completed by the date named in Article 1, but the Chief of Ordnance did waive the time limit, and the delivery of the armor was completed. The Chief of Ordnance found that delay had been due to a certain cause. The company contends that the cause so found by the Chief of Ordnance was one of those for which the contract stipulated that it should have immunity from damages.

The right of the Ordnance Department to charge the company with liquidated damages must be found in the contract or the deduction of which the company complains must be held to have been unauthorized and wrongful.

The contract did not say that the company should not be relieved of its obligation to perform within a limited time, unless certain causes should prevent performance altogether. It did provide that the company should not be charged with damages if the completion of its work were delayed by causes falling within a certain description. The delay set

up by the Ordnance Department as its justification for making the deduction resulted from a cause coming within that description. Hence the deduction was unauthorized.

JAMES H. HAYDEN,
Of Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

CARNEGIE STEEL COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 171.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Appellant sues to recover the sum of $8,595.35, retained by the Government as liquidated damages upon the final settlement of a contract for the manufacture and delivery of armor plate. The court sustained the Government's demurrer with respect to part of the claim, amounting to $7,564.08, for liquidated damages from November 7, 1911, to the date of final delivery, and gave judgment for appellant in the sum of $1,031.08, liquidated damages retained for the delay up to November 7, 1911. The Government has accepted the judgment of the lower court as final in all respects.

Appellant entered into a contract whereby it agreed to deliver several kinds of armor plate to the Govern-

ment on certain dates named therein, and in the event of failure to do so, to submit to liquidated damages for each day after the date fixed for final delivery (Article IV, Rec. 9). The contract further provided (Article VIII, Rec. 10) "that in making final settlement based upon the date of completion of the delivery the party of the first part shall receive credit for such delays occurring during the performance of the contract as the said Chief of Ordnance may determine to have been due to unavoidable causes, such as fires, storms, labor, strikes, actions of the United States, etc., and the date of completion shall be considered for the purposes of final settlement as the date of the actual completion of the delivery, less the delays due to said unavoidable causes."

Appellant's position is that the company was not chargeable with delays and the liquidated damages resulting therefrom, because the delay was unavoidable and therefore came within the contractual description of the delays not chargeable to appellant.

The Government's position is that the delays were not within the terms of the contract, such as fires, storms, labor strikes, actions of the United States, etc., and therefore appellant was liable for the same.

ARGUMENT.

The only proposition to be considered in this case is whether the delays from November 7 to final delivery, for which the Government retains liquidated damages, were unavoidable as defined by the terms of the contract (Rec. 10), which in indicating the

meaning of the word "unavoidable" limits the same to such causes as fires, storms, labor strikes, actions of the United States, etc. If the delays were not unavoidable within the limiting phraseology of the contract, then the judgment of the court should be sustained.

Appellant alleges, in substance (Rec. 2 and 3) that they were unavoidable because: (*a*) They were then unforseeable and in consequence thereof the delivery was delayed; (*b*) prior to the manufacture of the said armor plate no face-hardened armor plate 18 inches thick had been manufactured in this or any foreign country, and "no information with respect to process or processes to be employed in its manufacture was obtainable;" (*c*) appellant applied the formula for treating 14-inch plate to one of the 18-inch plates and then had the same subjected to the "ballistic test applied to armor manufactured for the Navy Department at the Naval Proving Ground, Indian Head," and the same was successful; (*d*) subsequently, when the ballistic test as prescribed by the contract was made, the plates failed to meet requirements; (*e*) appellant then called metallurgists to its aid, made tests, and with all expedition possible finally produced metallurgical conditions formerly lacking, but which produced plates that were satisfactory.

Appellant contends that the foregoing facts created a situation whereby the delays leading up to the discovery of the successful method were unavoidable

and such as should be classed with fires, storms, labor strikes, actions of the United States, etc.

The foregoing recital of appellant's position presents a situation so obviously outside the contract provision governing delays due to unavoidable causes that to make an extensive argument would be superfluous. The very fact that the successful process was discovered proves that it was foreseeable and therefore chargeable to appellant's failure to exercise foresight. The type of causes indicated in and contemplated by the contract were such as were not in existence when the contract was executed; but the very cause (lack of knowledge) which produced the delay in this case was in existence when the agreement was made. That fact can not redound to appellant's advantage and the Government's disadvantage. In agreeing to manufacture 18-inch armor plate appellant knew that it was undertaking to do something which had not theretofore been accomplished. Its expert metallurgists believed that the process which had been used for the manufacture of 14-inch armor would meet the requirements for the manufacture of armor of 18-inch thickness. However, the causes of delay indicated in the contract did not include ignorance or lack of scientific knowledge on the part of appellant. The kind of delay excusable was one which must have arisen from some cause having no essential relation to the contract but as evidenced by the descriptive words therein.

The leading case of *Dermott* v. *Jones* (2 Wall. 1) would seem to settle the question of whether an obstacle, merely because it was unforeseen would bring a delay resulting therefrom within the category of delays, such as are caused by the act of God, strikes, etc. Mr. Justice Swayne, delivering the opinion, said (pp. 7 and 8):

> In that instrument the defendant in error made a covenant. That covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well-settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.
>
> The application of this principle to the class of cases to which the one under consideration belongs is equally well settled. If a tenant agree to repair, and the tenement be burned down, he is bound to rebuild. A company agreed to build a bridge in a substantial manner, and to keep it in repair for a certain time. A flood carried it away. It was held that the company was bound to rebuild.

A person contracted to build a house upon the land of another. Before it was completed it was destroyed by fire. It was held that he was not thereby excused from the performance of his contract. A party contracted to erect and complete a building on a certain lot. By reason of a latent defect in soil the building fell down before it was completed. It was held (*School Trustees* v. *Bennett*, a case in New Jersey, cited by counsel) that the loss must be borne by the contractor. The analogies between the case last cited and the one under consideration are very striking. There is scarcely a remark in the judgment of the court in that case that does not apply here. Under such circumstances equity can not interpose.

The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.

Hanthorn v. *Quinn* (69 Pacific (Ore.), 817, 821).

The Harriman (admiralty) (9 Wall. 161).

Railroad v. *Smith* (21 Wall. 255, 253).

Smoot v. *United States* (15 Wall. 36, 46).

Jacksonville, etc., Railway Co. v. *Hooper* (160 U. S. 514, 527).

Simpson v. *United States* (172 U. S. 372).

United States v. *Gleason* (175 U. S. 588, 602).

Satterlee v. *United States* (30 C. Cls. 31, 33, 50).

Rowe v. *Town of Peabody* (93 N. E. (Mass.) 604).

Marsh v. *Johnston* (109 N. Y. Supp. 1104).

Lorillard v. *Clyde* (142 N. Y. 456).

Buffalo Company v. *Bellevue Company* (165 N. Y. 247).

Chicago Railroad Co. v. *Sawyer* (69 Ill. 285).

Beach on Modern Law of Contracts, sec. 217.

Chitty on Contracts, 272.

Day v. *United States* (48 C. Cls. 128).

Chief Justice Campbell (Rec. 18) sums up this whole question when he says:

> The difficulties under which claimant labored to make the armor plate meet the requirements of its contract were not due to "unavoidable causes" within the meaning of those terms in the contract and, though unforeseen, did not render the performance impossible. The court can not make a different contract from that which the parties made for themselves.

Since the delay did not come within the descriptive terms of the contract relative to the causes for which delays would be excusable, it is respectfully sub-

mitted that the lower court was right in dismissing that part of the claim for liquidated damages accruing during the period from November 7 to the date of final delivery.

HUSTON THOMPSON,
Assistant Attorney General.

○

CARNEGIE STEEL COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 171. Argued January 21, 1916.—Decided February 21, 1916.

Ability to perform a contract is of its very essence, and delay resulting from absence of such ability is not due to unavoidable causes such as fires, storms, labor strikes, actions of the United States, etc., as enumerated in the contract involved in this action.

The fact that a contractor engaging to deliver armor plate of specified qualifications as to thickness, hardness, etc., was delayed by un-

[1] *Cadierque* v. *Duran*, 49 California, 356; *Christman* v. *Brainerd*, 51 California, 534; *Wright* v. *Laugenour*, 55 California, 280; *Dillon* v. *Saloude*, 68 California, 267; *Cushing* v. *Keslar*, 68 California, 473; *Garfield* v. *Wilson*, 74 California, 175; *Anthony* v. *Jilson*, 83 California, 296, 299–300; *Goldberg* v. *Thompson*, 96 California, 117.

foreseen difficulties in the then new art of manufacturing does not excuse performance if such delays were not within the excepted reasons for delay.

49 Ct. Cl. 391, affirmed.

THE facts, which involve the construction of a contract for armor plate with the United States and the right of the contractor to recover sums withheld for delay in completion of the contract, are stated in the opinion.

Mr. James H. Hayden for appellant:

The company was not chargeable with the delay that occurred in the delivery of the armor or liable for the sum that the United States deducted as liquidated damages.

The first proviso in article 8 of the contract cannot be so interpreted as to allow the Department to refuse to pay the sum in dispute.

The contract was drawn by the Bureau of Ordnance, and any language of doubtful meaning contained in it should be given an interpretation favorable to the company, rather than one favorable to the Ordnance Department. *Noonan* v. *Bradley*, 9 Wall. 394, citing *Mayer* v. *Isaac*, 6 Mees. & W. 612; *Garrison* v. *United States*, 7 Wall. 668; *Orient Ins. Co.* v. *Wright*, 1 Wall. 456.

The proviso relates to the forfeiture by the company of part of the sum that the Department agreed to pay for the armor actually furnished. Clauses of contracts and of statutes relating to forfeiture invariably receive the one of two or more possible interpretations which is most favorable to the party against whom the forefeiture is asserted. *Phila., Wilm. & Balt. R. R.* v. *Howard*, 13 How. 307, 340; *N. Y. Indians* v. *United States*, 170 U. S. 1, 25.

Even in cases growing out of contracts of the United States, a penal clause, or one providing for the deduction of liquidated damages, is not to be given a liberal construction in favor of the Government.

Where the meaning of an instrument or statute is obscure and the language employed is a proper subject for interpretation, courts will give effect to every provision and word and will not treat any part of it as meaningless or nugatory, unless its provisions are in such hopeless conflict they cannot be reconciled. *Philadelphia* v. *River Front R. R.*, 133 Pa. St. 134.

The proviso does not purport to be complete in itself and on its face bears evidence of its incompleteness. The doctrine "expressio unius est exclusio alterius" is not to be followed in determining the true intent and meaning of a proviso of this nature. *United States* v. *Barnes*, 222 U. S. 513.

If the law required a strict and literal construction of the proviso in question, instead of the reverse, it would not justify the interpretation that the court placed upon it, for as we have seen, that is neither strict or literal, but really a distortion of the proviso.

The court's interpretation cannot be defended on the ground that it was reasonable, for it was not. *Minis* v. *United States*, 15 Pet. 423; *White* v. *United States*, 191 U. S. 545; *Weiss* v. *Swift*, 36 Pa. Sup. 376.

The Ordnance Department and the accounting officers, and the court also, proceeded with the idea that the proviso was a fit subject for the application of the maxim "expressio unius est exclusio alterius." But in the present instance the facts were not such as to warrant an attempt to apply it.

The delay in this case should be classed as an unavoidable cause, within the meaning of the provision in the contract. Broom's Leg. Max., 8th ed., 506; Id., 515; Id., 7th ed., 589.

This is not a case for the application of the doctrine of *ejusdem generis*. *United States* v. *Mescall*, 215 U. S. 26; *Chic., Mil. &c. Ry.* v. *Hoyt*, 149 U. S. 1, 14; Endlich, Inter. Stat., § 112; *McReynolds* v. *People*, 230 Illinois, 623;

26 Am. & Eng. Enc. Law, 2d ed., p. 610; *Brown* v. *Corbin*, 40 Minnesota, 508.

Delay in the performance of a contract may result from a cause, which, though unavoidable, and unavoidable in the sense in which that term is used in the contract, would not render performance impossible.

The credit allowed by the Chief of Ordnance for delay caused by act of the United States did not bar the company from asserting in court its right to further credit for the cause assigned or for any other cause of delay on account of which the Chief of Ordnance refused to allow any credit, supposing that he was not authorized to do so. *Milne* v. *United States*, 45 Ct. Cls. 314, 321, does not apply, and see *Gegiow* v. *Uhl*, 239 U. S. 3.

Mr. Assistant Attorney General Huston Thompson for the United States:

The causes of delay indicated in the contract did not include ignorance or lack of scientific knowledge on the part of appellant. The kind of delay excusable was one which must have arisen from some cause having no essential relation to the contract but as evidenced by the descriptive words therein.

An obstacle, merely because it was unforeseen, does not bring a delay resulting therefrom within the category of delays, such as are caused by the act of God, strikes, etc.

If unexpected impediments lie in the way, and a loss must ensue, the loss must fall where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated. *Hanthorn* v. *Quinn*, 69 Pac. Rep. 817; *The Harriman*, 9 Wall. 161; *Railroad* v. *Smith*, 21 Wall. 255; *Smoot* v. *United States*, 15 Wall. 36, 46; *Jacksonville &c. Ry.* v. *Hooper*, 160 U. S. 514, 527; *Simpson* v. *United*

States, 172 U. S. 372; *United States* v. *Gleason*, 175 U. S. 588, 602; *Satterlee* v. *United States*, 30 Ct. Cls. 31, 33, 50; *Rowe* v. *Peabody*, 93 N. E. Rep. 604; *Marsh* v. *Johnston*, 109 N. Y. Supp. 1104; *Lorillard* v. *Clyde*, 142 N. Y. 456; *Buffalo Co.* v. *Bellevue Co.*, 165 N. Y. 247; *Chicago R. R.* v. *Sawyer*, 69 Illinois, 285; Beach on Modern Law of Contracts, § 217; Chitty on Contracts, 272; *Day* v. *United States*, 48 Ct. Cls. 128.

Since the delay did not come within the descriptive terms of the contract relative to the causes for which delays would be excusable the lower court was right.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition in the Court of Claims for the recovery of $8,595.35, alleged to be due claimant as a balance of the price of armor plate furnished the Government under a contract between it and claimant.

The contract is an elaborate one and by it claimant engaged to manufacture for the Ordnance Department armor plates of a certain designated thickness in conformity with instructions, specifications and drawings attached to and made a part of the contract. And claimant agreed to provide certain of the 18-inch plates for the purpose of the ballistic test prescribed by the specifications, and that such plates when subjected to the ballistic test should fulfill certain requirements set forth in the specifications. The dates of delivery were to be on or before September 7, 1911, and November 7, 1911, and the place of delivery the Bethlehem Steel Company, South Bethlehem, Pennsylvania.

The Government engaged to receive the plates when manufactured, tested and approved as provided, and make payment for them in installments from time to time as the manufacture of the armor and material pro-

gressed and after delivery. In the event of the claimant failing to prosecute the manufacture of the armor and material properly or to complete delivery on or before the dates named in the contract, the Chief of Ordnance might complete such manufacture at the expense of claimant, charging it with the cost thereof in excess of the contract price; "or else (2) waive the time limit named in the contract and permit the claimant to complete the delivery of the armor and material within a reasonable time, and thereupon deduct from the sum stipulated to be paid the claimant for all of the armor and material, as liquidated damages, a sum equal to one-thirtieth of one per centum of the contract price of all armor and material remaining undelivered on November 7, 1911, for each day of delay in its delivery; Provided, however, that in computing the amount of any such deduction, the claimant should be given credit for delays occurring during the performance of the contract, which the Chief of Ordnance might determine to have been due 'to unavoidable causes, such as fires, storms, labor strikes, actions of the United States and so forth,' and that the date of completion of the delivery, for the purposes of the final settlement between the parties, should be a date to be ascertained by deducting, from the whole period between the signing of the contract and the date of the actual delivery, all delays which were found to have been due to unavoidable causes."

It is alleged that claimant encountered difficulties which were unforeseen by both parties when the contract was made, and were then unforeseeable, and in consequence thereof the delivery of the armor and pertaining material was delayed unavoidably.

That prior to the manufacture of the armor no face-hardened armor 18 inches in thickness had been manufactured in this or any foreign country and no information with respect to the process or processes to be employed in its manufacture was obtainable.

That for the purpose of learning what manner of treatment or face-hardening process should be applied to the 18-inch plates, and in order that they might attain the highest degree of efficiency possible and meet all the requirements of the specifications, claimant completed one of the plates, applying to it a treatment or face-hardening process deduced from the formula which claimant and every other manufacturer of armor plate in this and every foreign country had followed in the manufacture of armor plate and which was recognized by authorities on the subject as the one which would give the best results.

That upon its completion the plate was, on April 19, 1911, subjected to the ballistic test and it met the requirements of the specifications. Thereupon claimant proceeded to complete all of the plates, certain of which were selected for the purpose of the ballistic test and failed to fulfill the requirements of the specifications. Other plates were selected and failed. Thereupon claimant, with all due diligence and dispatch, made or caused to be made by metallurgical experts exhaustive tests and experiments, and it was ascertained that in order to pass the test required by the Ordnance Department the plates must possess certain metallurgical qualities or conditions which, up to that time, were unknown to any one and the necessity for which was not foreseeable when the contract was made. In conducting the test it was necessary to use plates of full size and the tests were conducted with all due diligence and dispatch. From the plates thus tested the Ordnance Department selected a third plate which was tested January 19 and 24, 1912, and was found to fulfill the requirements of the specifications. Claimant in due course finished all of the plates which the contract called for and they were approved and delivered as in the manner prescribed.

It is alleged that by reason of the circumstances de-

tailed there were delays in the delivery of the plates and that the delays were due to causes which were unavoidable within the meaning of the contract.

On account of the delays, however, the Ordnance Department proposed to deduct from the contract price of the armor and pertaining material the sum of $8,598.15 as liquidated damages on account of a portion of the delay. Claimant made protest, asserting that the delays were due to causes provided for in articles 4 and 8 of the contract.

By article 4 it was provided that in case of failure of claimant to deliver any or all of the armor contracted for there would be deducted from any payment to be made to claimant 1/30 of 1% of the contract price of all of the armor remaining undelivered for each and every day of delay in the completion of the contract, not, however, by way of penalty but as liquidated damages.

It was, however, provided in article 8 of the contract that the Chief of Ordnance in case of delay in the delivery of the armor as provided in article 1 of the contract, instead of completing the manufacture or delivery of the material at the expense of claimant, might waive the time limit and deduct from any payment due or to become due the liquidated damages, if any, provided for in article 4: "*Provided*, however, that in making final settlement based upon the date of completion of the delivery, the party of the first part [claimant] shall receive credit for such delays occurring during the performance of the contract as the Chief of Ordnance may determine to have been due to unavoidable causes, such as fires, storms, labor strikes, action of the United States, etc., and the date of completion shall be considered for the purposes of final settlement as the date of the actual completion of the delivery less the delays due to unavoidable causes; but none of the above causes shall constitute a basis for an action against the United States for damages."

The Government filed a demurrer to the petition. It was sustained as to $7,564.08 of the amount sued for and overruled as to $1,031.08. The damages on account of delay to the amount of the latter sum the court found was due to the Government's delay. The other sum, that is $7,564.08, the court attributed to the claimant, the court saying, through Chief Justice Campbell, that "the difficulties under which claimant labored were not due to 'unavoidable causes' within the meaning of those terms in the contract and, though unforeseen, did not render the performance impossible;" and added: "The court cannot make a different contract from that which the parties made for themselves. *The Harriman*, 9 Wall. 161, 172; *Sun Printing & Publishing Ass'n* v. *Moore*, 183 U. S. 642; *Satterlee's Case*, 30 Ct. Cls. 31; *Pacific Hardware Co.* v. *United States*, 48 Ct. Cls. 399."

It will be observed that the point in the case is a short one. It is whether the causes of delay alleged in the petition were unavoidable or were of the character described in the contract, that is, "such as fires, storms, labor strikes, action of the United States, etc." The contention that the alleged causes can be assigned to such category creates some surprise. It would seem that the very essence of the promise of a contract to deliver articles is ability to procure or make them. But claimant says its ignorance was not peculiar, that it was shared by the world and no one knew that the process adequate to produce 14-inch armor plate would not produce 18-inch armor plate. Yet claimant shows that its own experiments demonstrated the inadequacy of the accepted formula. A successful process was therefore foreseeable and discoverable. And it would seem to have been an obvious prudence to have preceded manufacture, if not engagement, by experiment rather than risk failure and delay and their consequent penalties by extending an old formula to a new condition.

But even if this cannot be asserted, the case falls within *The Harriman*, *supra*, where it is said that "the principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse performance."

And it was held in *Sun Printing Ass'n* v. *Moore*, *supra*, that "it was a well-settled rule of law that if a party by his contract charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him." Cases were cited, and it was said the principle was sustained by many adjudications.

It was said, however, in *The Harriman*, 9 Wall. 161, 172, that "the answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation," and such a stipulation is relied on in the case at bar. Ignorance of the scientific process necessary for face-hardening 18-inch armor plate is asserted to be an unavoidable cause of the character of the enumeration of article 8 of the contract, that is, "such as fires, storms, labor strikes, action of the United States, etc." The contention is that it is the same "genus or kind," because (1) it was not foreseeable when the contract was made; (2) was not the result of any act or neglect on the part of claimant; (3) was not a cause the company could prevent. What we have already said answers these contentions. Ability to perform a contract is of its very essence. It would have no sense or incentive, no assurance of fulfillment, otherwise; and a delay resulting from the absence of such ability is not of the same kind enumerated in the contract is not a cause extraneous to it and

independent of the engagements and exertions of the parties.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.